IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7120 OF 2004.

Shri Kalaram Sansthan Panchavati
Nashik and others. ... Petitioners.
Versus.
Manohar Balkrishna Punjari & others. ... Respondents.

Shri R.D.Soni i/by M/s.Ram & Co. for the Petitioners.

Shri J.N.Pawar for the Respondent No.1.

CORAM : ABHAY S.OKA, J.

DATED : 6th June, 2007.

P.C.:

1. Submissions of the learned Advocates appearing for the parties were heard yesterday. This Court issued notice of final disposal on 6th September 2005.

2. By this petition under Article 227 of the Constitution of India, the challenge is to certain directions issued by the learned Joint Charity Commissioner, Nashik by order dated 3rd July 2004.

3. The 1st Petitioner is a Public Charitable Trust duly registered under the provisions of the Bombay Public Trusts Act, 1950 (hereinafter referred to as "the said Act of 1950"). According to the averments made in the petition, the 2nd Petitioner was at the relevant time President of the 1st Petitioner-Trust. Petitioners Nos.2, 3 and 8 to 11 are the present Trustees of the 1st Petitioner-Trust. Petitioners Nos.5, 6 and 7 were also

the Trustees of the said Trust at the relevant time. The 1st Respondent was also a Trustee of the said Trust. The 2nd to 4th Respondents are the tenants occupying the Trust property and 5th to 8th Respondents are the Purchasers of the Trust property. An application was made by he 1st Respondent under sub-section (2) of section 36 of the said Act of 1950 praying for revocation of the order passed under sub-section (1) of section 36 of the said Act of 1950 by which permission was granted for sale of the Trust property. By the impugned Judgment and order, the Application made by the 1st Respondent was rejected. The challenge in this petition is to the clause 2 of the operative part of the impugned order, which reads thus:

> "(2) However, the suo-moto proceedings are hereby initiated under section 39 and 41-B of the B.P.T.Act, 1950 against the trustees opponent 6 to 15 and Applicant and the Ld.Deputy Charity Commissioner, Nashik Region, Nashik is directed to make the discreet inquiry under the provisions as per the observations made hereinabove and take all possible legal actions Civil and Criminal under B.P.T.Act against the trustees and to restore the losses if any, caused to the property of the trust. The inquiry shall be

made within 3 months from the date of this order."

The submission of the learned Advocate for the Petitioners is that after dismissing the Application made by the 1st Respondent, there was no occasion for the learned Joint Charity Commissioner to direct initiation of suo-moto proceedings under sections 39 and 41-B of the said Act of 1950. He submitted that in any case without complying with the provisions of section 38 of the said Act of 1950, there could not have been an order for initiating the proceedings under section 39 of the said Act of 1950. He submitted that the learned Joint Charity Commissioner has exceeded the jurisdiction vested in him by passing the aforesaid directions.

4. The learned Counsel appearing for the 1st Respondent submitted that there is no prejudice to the Petitioners as by the impugned order only an enquiry is ordered to be initiated. He submitted that the proceedings will be naturally decided in accordance with the law and therefore, no interference is called for.

5. I have carefully considered the submissions. It is not necessary to refer to the grounds on which the prayer made by the 1st Respondent was rejected as that is not the subject matter of challenge. It will be

necessary to refer to the relevant provisions of the said Act of 1950. Sections 38 and 39 of the said Act of 1950 read thus:

> "**38. Explanation on report of auditor or on complaint.**
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> . On receipt of a report of the auditor under section 34 or of a report, if any, made by an officer authorised under section 37 or on receipt of a complaint in respect of any trust the Deputy or Assistant Charity Commissioner to whom the report is submitted or complaint is made shall require the trustee or any other person concerned to submit an explanation thereon within such period as he thinks fit.
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> **39. Report to Charity Commissioner.**
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> . On considering the report referred to in section 38, the accounts or explanation, if any, furnished by the trustees or any other person connected with the public trust and after holding an inquiry in the prescribed manner, the Deputy or Assistant Charity Commissioner shall record his findings on the question whether or not a trustee or the person connected with the trust has been

> guilty of gross negligence, breach of trust, misappropriation or misconduct which resulted in loss to the trust, and make a report thereof to the Charity Commissioner."

Section 39 contemplates that an action can be initiated only on considering the report referred to in section 38. On the basis of a report submitted under section 38 an inquiry is required to be conducted and only after the inquiry, a finding is required to be recorded on the question whether or not a trustee or the person connected with the trust has been guilty of gross negligence, breach of trust, misappropriation or misconduct resulting into the loss to the Trust. After holding an inquiry, the Deputy or Assistant Charity Commissioner is required to submit the report to the Charity Commissioner and the Charity Commissioner is required to pass further orders in terms of section 40 of the said Act of 1950 after considering the report. On a plain reading of sections 38 and 39 of the said Act of 1950, the condition precedent for holding an inquiry under section 39 is the compliance with section 38 of the said Act of 1950. In the present case, admittedly there is no report submitted as contemplated by section 38 of the said Act of 1950. By the impugned order, the proceedings have been ordered to be initiated under

section 39. The result of the impugned order is that an inquiry will be held under section 39 though there is no report as contemplated under section 38 of the said Act of 1950. In view of this legal position, the learned Joint Charity Commissioner could not have directed to hold an inquiry under section 39 by passing the impugned order. Therefore, that part of the direction will have to be set aside. It is, however, obvious that if a Report or a Complaint as contemplated under section 38 of the said Act of 1950 is received either by the Deputy or the Assistant Charity Commissioner, necessary proceedings under sections 38 and 39 of the said Act 1950 can always be initiated in respect of the grievance made by the 1st Respondent.

6. Under section 41B of the said Act of 1950 on the basis of a complaint in writing from any person having interest in any public trust or suo motu, the Charity Commissioner can institute an inquiry. Thus there is a power vesting in the Joint Charity Commissioner to institute a suo motu inquiry as contemplated by sub-section (1) of section 41B of the said Act of 1950. On the basis of the various allegations made by the 1st Respondent, the learned Charity Commissioner has exercised power to institute suo motu inquiry. It is, however, obvious that while holding an inquiry, the procedure laid down by section 41B of the said Act of

1950 is bound to be followed. Therefore, it is very difficult to find fault with the direction given under section 41B of the said Act of 1950.

7. Hence the writ petition is disposed of by the following order:

(i) That part of the order by which a direction has been issued for initiation of suo motu proceedings under section 39 of the Public Trust Act, 1950 is quashed and set aside. It is, however, clarified that this order will not preclude initiation of proceedings under sections 38 and 39 of the said Act of 1950 in accordance with the law.

(ii) Rest of the order stands confirmed.

(iii) It is made clear that all contentions of the parties in the inquiry under section 41B of the said Act of 1950 are expressly kept open. It is obvious that the proceedings under section 41B of the said Act of 1950 will be decided on its own merits without being influenced by the observations made in the impugned order.

(iv) Time fixed by the learned Charity Commissioner for completion of inquiry is extended till the end of November 2007.

Judge.